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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222 - Stop Code: 1170  
Washington, DC 20554

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and eleven copies of its Comments in CS Docket No. 96-46.

If there are any questions in connection with the foregoing, please contact the undersigned.

Very truly yours,

  
Roger Goodspeed

RG/ak  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Section 302 )  
of the Telecommunications Act )  
of 1996 )  
 )  
Open Video Systems )

CS Docket No. 96-46

In the Matter of )  
 )  
Telephone Company-Cable )  
Television Cross-Ownership )  
Rules, Sections 63.54-63.58 )

CC Docket No. 87-266 (Terminated)

COMMENTS OF CAPITAL CITIES/ABC, INC.

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April 1, 1996

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## Summary

The principle that we believe should govern the Commission in implementing OVS is the judgment of Congress which is incorporated in the Telecommunications Act OVS model that broadcast signals should be as universally available and readily accessible in the wired world as they are in the over-the-air environment.

In creating the OVS model, Congress has once again reaffirmed that, in a world of increasing numbers of non-terrestrial, vertically integrated program distributors, there is a substantial government interest in maintaining the continued availability (and hence the competitive viability) of free over-the-air television and the service it provides to the local communities that each station serves.

Congress has made the judgment that broadcasters are deserving of the same protections on OVS as they enjoy on cable. Section 653(c)(2)(A) of the Act provides that new OVS must-carry and retransmission-consent regulations shall "impose obligations that are no greater or lesser than the obligations" imposed on cable operators. The Commission should vigorously enforce the Congressional mandate.

In applying the must carry channel positioning requirement to OVS technology, the Commission should insure that channel positioning continues to serve its two basic purposes -- to allow broadcasters to identify themselves by their unique channel number "brands," and to serve as the means whereby the viewer can access

broadcast channels as readily as in the unwired world. Further, in order to make broadcast signal availability fully effective in the OVS context, the Commission should require that current broadcast channels -- all of which are analog -- be available in analog format on the OVS system.

In order to serve Congress' goal to encourage telephone companies to participate in the video marketplace, must carry and retransmission consent signals should not count against the one-third of capacity that an OVS operator is entitled to select.

While channel sharing is a potentially useful option to increase channel capacity, we agree with the Commission that it should not be mandatory because such a requirement would improperly conflict with the rights of the program provider to control the distribution of its products.

The program exclusivity rules are important components of the Commission's goals to foster full and fair competition among television program distributors and promote efficient program delivery. The rules should apply to OVS with the same scope and force as they apply to cable operators. To insure most effectively that the rules will be observed, we believe that the Commission should make compliance the joint responsibility of the multichannel video program distributor and the OVS operator.

We agree with the Commission's interpretation that the non-discrimination provisions set out in section 653(b)(1) of the Telecommunications Act "are meant to ensure that an open video

system operator does not provide itself or its affiliates with a marketing advantage vis a vis other video programming providers on the open video system in the way it markets its affiliated programming or interfaces with the customer in describing program selections." The Commission should articulate the non-discrimination principle in broad terms to include any activity which has the effect of making it more difficult for viewers to identify and locate unaffiliated programmers.

The separate provision of the Act which prohibits an OVS operator from omitting broadcast stations and other unaffiliated video programming services from navigational devices and menus, when combined with the Act's directive to apply must-carry channel positioning requirements to OVS, underscores Congress' intent to give preference to broadcasters over all other program providers. To carry out this intent, Commission regulations should ensure that subscribers are able to tune to local broadcast stations as easily and directly as they do in the cable environment.

The "suitable and unique" identification provision of the Act should be interpreted to apply not just to the programming signal but also to the navigation guide or menu. The OVS operator should be required to carry on the menu not only the name of the provider's program but also the provider's logo or other branding device used to identify its program or its overall service.

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To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC"), a wholly-owned subsidiary of The Walt Disney Company, submits herewith its Comments in response to the Report and Order and Notice of Proposed Rulemaking ("Notice") in the above-entitled proceeding.<sup>1</sup>

Introduction

Following enactment of the Telecommunications Act of 1996,<sup>2</sup>

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<sup>1</sup> CS Docket No. 96-46 and CC Docket No. 87-266 (Terminated), Report and Order and Notice of Proposed Rulemaking, FCC 96-99 (released March 11, 1996).

<sup>2</sup> Publ. L. No. 104-104, 110 Stat. 56 (approved February 8, 1996) (the "Telecommunications Act").

the Commission initiated this proceeding to seek comment on how it should implement the requirements of section 653 of the Act relating to the new open video system ("OVS") option for telephone companies entering the video programming marketplace. In these comments we will treat those issues of particular importance to broadcasters -- namely, implementation of must carry/retransmission consent, the application of network non-dupe/syndex/sports exclusivity and the non-discrimination requirements of the Act.

The principle that we believe should govern the Commission in implementing these provisions is the judgment of Congress which is incorporated in the Telecommunications Act OVS model that broadcast signals should continue to be as universally available and readily accessible in the wired world as they are in the over-the-air environment.

#### I. Must-Carry/Retransmission Consent

In creating the OVS model, Congress has once again reaffirmed that, in a world of increasing numbers of non-terrestrial, vertically integrated program distributors, there is a substantial government interest in maintaining the continued availability (and hence the competitive viability) of free over-the-air television and the service it provides to the local communities that each station serves. In doing so, Congress has carried forward into the Telecommunications Act a long-standing tenet of this country's telecommunications policy. For example, in granting broadcasters must carry on cable systems, Congress recognized that cable



possesses both bottleneck power and the economic incentive to use that power to delete broadcast signals or to allocate them to disadvantageous channel positions thus depriving broadcasters of their mass audience.<sup>3</sup>

Similarly, the Commission itself has recognized in numerous contexts the importance of fostering the special status of broadcasters in order to maintain their competitive vitality in a multi-channel world. The Commission's network non-duplication and syndicated exclusivity rules are designed to secure the integrity of broadcast program exclusivity against cable infringement.<sup>4</sup> The Commission has eliminated the anachronistic fin-syn rules to free broadcast networks to more effectively compete against non-broadcast program providers.<sup>5</sup> As the Commission plans for the digital world of the future, it has previously decided to limit initial eligibility for ATV channels to existing broadcasters to insure their survival and their ability to continue to serve the public interest.<sup>6</sup>

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<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, sections 2(a)(14)-(16) (the "1992 Cable Act"). See also S. Rep. No. 102-92, reprinted in 1992 U.S. Code Cong. & Admin. News 1191-95.

<sup>4</sup> See Report and Order, Gen. Docket No. 87-24, 64 RR 2d 1818, pars. 73-75, 116, 123 (1988), on reconsideration, Memorandum Opinion and Order, Gen. Docket No. 87-24, 66 RR 2d 44 (1989), aff'd sub nom., United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

<sup>5</sup> See Second Report and Order, MM Docket No. 90-162, 72 RR 2d 1044, pars. 43-55 (1993); Report and Order, MM Docket No. 95-39, 78 RR 2d 1468, pars. 28-30 (1995).

<sup>6</sup> Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, MM Docket No. 87-268, FCC 95-315 (released

The policy of maintaining and protecting broadcaster access to viewers is based on a pragmatic and sound judgment about the broadcast industry -- free over-the-air broadcasters are entirely dependent on access to the mass audience. It is access to the mass audience that affords broadcasters the advertising base that enables stations to provide local news, weather, sports and informational programming, and networks to provide the quality international and national news, sports and entertainment programming that the public has come to expect and count on.

In enacting the Telecommunications Act, Congress has made the judgment that broadcasters are deserving of the same protections on OVS as they enjoy on cable. Section 653(c)(2)(A) provides that new OVS must-carry and retransmission-consent regulations shall "impose obligations that are no greater or lesser than the obligations" imposed on cable operators.<sup>7</sup> The Commission should vigorously enforce the Congressional mandate.

The Commission asks "whether ... open video system operators should ensure that every subscriber can receive must carry channels."<sup>8</sup> The answer is apparent on the face of statute. The Telecommunications Act, in section 653(c)(1), provides that Section 614 shall apply to "any operator of an open video system" (emphasis supplied). Just as in the cable world where the cable operator is responsible for compliance with Section 614, the operator in the

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August 9, 1995).

<sup>7</sup> See Notice, par. 60.

<sup>8</sup> Notice, par. 59.

OVS context, is charged by the statute with the same carriage obligations.

A. Signal Availability and Channel Positioning

The must-carry signal availability and channel positioning provisions -- requiring that broadcast signals be provided to every subscriber and be viewable on all television receivers connected to the system on the channel selected (from among three options) by the broadcaster -- are as vital to broadcasters on OVS systems as they are on cable systems.<sup>9</sup> As the Commission has recognized, channel positioning is particularly important to broadcasters.<sup>10</sup> Just as broadcasters' channel identity is critical to their retention of viewers who receive their signals over cable, the same is true in the OVS context. Moreover, as video options proliferate, channel landmarks, which are a vital component of the unique "branding" of a broadcaster's service, will become ever more important.

We recognize that OVS systems may employ a different technology than cable and that the parameters of that technology have not yet been defined. In applying the channel positioning

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<sup>9</sup> See 47 C.F.R. sections 76.56(d) and 76.57(a). The Commission has declined to make any exception to the requirement that must carry channels be available to all subscribers. Memorandum Opinion and Order (Reconsideration), MM Docket No. 92-259, 76 RR 2d 627, pars. 16-17 (1994).

<sup>10</sup> See Report and Order, MM Docket No. 92-259, 72 RR 2d 204, par. 91 (1993) ("1993 Cable Report and Order"). See also H.R. Rep. No. 102-862, p. 75 (1991), reprinted in 1992 U.S. Code Cong. & Admin. News 1257.

requirement to the new technology, the Commission should insure that channel positioning continues to serve its two basic purposes -- to allow broadcasters to identify themselves by their unique channel number "brands," and to serve as the means whereby the viewer can access broadcast channels as readily as on cable systems today. In the cable world, this goal is accomplished through the "basic tier" requirement. The Commission should adopt a comparable concept for OVS to insure that broadcast stations are both universally available and as readily accessible on OVS as they are on cable. In short, there should be comparable obligations imposed on cable and OVS operators and broadcasters should be entitled to comparable protection.

Further, in order to make broadcast signal availability fully effective in the OVS context, the Commission should require that current broadcast channels -- all of which are analog -- be available in analog format on the OVS system. This will insure that all OVS subscriber homes -- not just those which have purchased expensive converters -- can access broadcast signals.

#### B. Multiple-Market OVS

The Commission asks how must carry should be defined for open video systems that span multiple markets.<sup>11</sup> The Commission faced and resolved a similar question in implementing cable must carry. Where a cable system serves a community or communities in more than one county and these counties are assigned to different ADI's, the

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<sup>11</sup> Notice, par. 60.

Commission decided that the cable operator must carry all the local commercial television signals in both ADI's (subject to the limitation of one-third of usable channel capacity). Where it is technically able to do so, the cable operator is permitted to offer different must-carry channel line-ups in different communities based on the locations of the particular communities in the respective ADI's. Otherwise, however, the Commission considers all broadcast stations in both ADI's "local" and therefore eligible for must carry.<sup>12</sup> The Commission should apply the same regulations to OVS.

C. Channel Capacity and Retransmission Consent Arrangements

We are mindful that one of Congress' goals in establishing the OVS option was to encourage telephone companies to participate in the video marketplace.<sup>13</sup> We believe that the Commission's tentative conclusion that must-carry signals should not count against the one-third of capacity that an OVS operator is entitled to select will further this goal.<sup>14</sup> It will allow OVS operators more capacity for their own programming and thereby provide an incentive for telephone companies to undertake OVS operations. The same rationale justifies excluding local broadcaster retransmission consent signals from the one-third count.

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<sup>12</sup> 1993 Cable Report and Order, par. 41.

<sup>13</sup> Notice, pars. 1-4.

<sup>14</sup> See Notice, par. 19.

There is another equally important reason for excluding retransmission consent signals from the OVS capacity cap. The opposite course would burden the exercise of retransmission consent and thereby undermine the broadcaster's right of election between must carry and retransmission consent established by the 1992 Cable Act. If the consequence for an OVS operator of reaching a retransmission consent agreement with a broadcaster (as opposed to must carry) is that the channel counts against its one-third cap, the OVS operator will have a disincentive to enter into such an arrangement or to compensate the broadcaster for the use of its signal.<sup>15</sup>

A broadcast station should be in no different regulatory position in negotiating with the OVS operator than it is with the cable operator. The Commission should make explicit that a broadcast station should be free to negotiate for either cash compensation or for any form of non-cash consideration, such as carriage of cable channels affiliated with the broadcast station owner, just as was the case in the first round of retransmission consent negotiations which followed the enactment of the 1992 Cable Act.

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<sup>15</sup> We think the Commission's proposed method for calculating the OVS operator's one-third channel selection -- whereby PEG and must carry channels are subtracted from the total channel capacity before the one-third/two-thirds calculation is made -- makes sense because it has the effect of allocating the channel loss caused by mandatory carriage ratably between affiliated and non-affiliated program suppliers. See Notice, par. 19 n. 34. Retransmission consent channels should be in the same category as must carry channels.

D. Channel Sharing

We agree with the Commission that channel sharing is a potentially useful option to increase channel capacity.<sup>16</sup> However, as the Commission recognizes, mandatory channel sharing would improperly conflict with the rights of the program provider to control the distribution, and the terms of distribution, of its content.<sup>17</sup> We have no objection to channel sharing in principle provided that (a) neither the OVS operator nor any other multichannel video program distributor on the OVS system is permitted either to condition carriage on the program provider's willingness to submit to a channel sharing arrangement or to dictate unilaterally the terms and conditions of channel sharing; (b) that every content provider retain full rights to control the terms and conditions of distribution of its programming; and (c) that channel sharing not operate to frustrate or reduce the rights otherwise enjoyed by the program provider, such as must-carry channel positioning and protection against signal degradation.

E. ATV

Finally, we take this opportunity to encourage the Commission to take into account advanced television in its consideration of these issues. We reiterate our belief that both the underlying policy of the 1992 Cable Act and the Commission's ATV policy goals cannot be served unless must carry is applied to broadcasters' ATV

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<sup>16</sup> Notice, par. 37.

<sup>17</sup> Notice, par. 41.

channels.<sup>18</sup> The Commission should require OVS systems (as well as cable systems) to carry both local stations' NTSC and ATV broadcast signals (excluding ancillary and supplementary subscription services). Such a course would help to insure that the goal of the 1992 Cable Act of preserving free over-the-air television is achieved. Moreover, it would advance the Commission's ATV goals of boosting the market penetration of ATV technology and accelerating the channel give-back in order to expedite the ATV transition.

## II. Network Non-Duplication/Syndicated Exclusivity/ Sports Exclusivity

As is the case with must carry/retransmission consent, the Act is clear that the Commission is directed to extend the existing network non-duplication, syndicated exclusivity and sports exclusivity regulations to OVS.<sup>19</sup> The Commission has concluded previously that program exclusivity rules as they apply to cable are important components of its goals to foster full and fair competition among television program distributors and promote efficient program delivery.<sup>20</sup> On the same policy grounds, the rules should apply to OVS with the same scope and force.

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<sup>18</sup> See Broadcasters Comments on the Fourth Notice of Proposed Rulemaking, MM Docket No. 87-268 (filed November 20, 1995), at 31-35.

<sup>19</sup> Telecommunications Act, section 653(b)(1)(D). See 47 C.F.R. sections 76.67; 76.92, et seq.; 76.151, et seq.

<sup>20</sup> Report and Order, Gen. Docket No. 87-24, 64 RR 2d 1818, pars. 73-75, 116, 123 (1988).



The Commission asks how to apply these regulations to OVS systems whose service territory crosses multiple community units. The Commission confronted and resolved a similar question in implementing must carry. Since must carry eligibility is based on ADI lines while the exclusivity rules use different geographic parameters, the Commission considered whether it should modify the exclusivity zones to conform to ADI-based market designations. The Commission decided that there was no reason to change the exclusivity rules for cable.<sup>21</sup> We see no reason that the Commission should depart from the cable precedent in the case of OVS. Again, there should be a comparability of operator responsibility and broadcast protection.

To insure most effectively that the rules will be observed, we believe that the Commission should make compliance the joint responsibility of the multichannel video program distributor and the OVS operator. Program distributors who aggregate program packages surely must take account of the rights they are purchasing including any pre-existing exclusivity commitments made to broadcasters. At the same time, the OVS operator occupies the unique position, similar to the cable operator, of controlling the wire. It is not unreasonable to require the OVS operator to be jointly responsible since his action would be required to physically implement a blackout if a signal impinges on protected exclusivity zones. If the same procedures are prescribed for OVS program exclusivity as apply to cable, the OVS operator will

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<sup>21</sup> 1993 Cable Report and Order, pars. 52-54.

receive timely notice from the broadcaster of its exclusivity claims and can review the affiliated and non-affiliated programming on the OVS system for duplicative programs just as cable operators are required to do with respect to cable channels.<sup>22</sup>

### III. Non-discrimination

We agree with the Commission's interpretation that the non-discrimination provisions set out in section 653(b)(1) of the Telecommunications Act "are meant to ensure that an open video system operator does not provide itself or its affiliates with a marketing advantage vis a vis other video programming providers on the open video system in the way it markets its affiliated programming or interfaces with the customer in describing program selections."<sup>23</sup> In interpreting the non-discrimination provisions, we believe the Commission must remain alert to the very real potential and incentive the OVS operator has to favor its own programming packages and those in which it has a financial interest. Therefore, we believe that "material or information ... for the purpose of selecting programming" should be broadly defined to encompass not only active promotion of OVS-owned channels but also a "default" program menu that would automatically tune to OVS-owned channels.<sup>24</sup> More generally, because it is impossible to

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<sup>22</sup> Compare 47 C.F.R. sections 76.67, 76.94 and 76.155 (program exclusivity notice provisions for cable).

<sup>23</sup> Notice, par. 48.

<sup>24</sup> Telecommunications Act, section 653(b)(1)(D)(i).

predict what means an OVS operator might use to gain a marketing advantage, the Commission should not seek to define in advance the circumstances which would constitute discrimination. Instead, the Commission should articulate the non-discrimination principle in broad terms to include any activity which has the effect of making it more difficult for viewers to identify and locate unaffiliated programmers.

In addition to the general non-discrimination provision of the Act, there is a separate provision which prohibits an OVS operator from omitting broadcast stations and other unaffiliated video programming services from navigational devices and menus.<sup>25</sup> We believe that this separate provision, when combined with the Act's directive to apply must-carry channel positioning requirements to OVS, dictates that Commission regulations should ensure that subscribers are able to tune to local broadcast stations as easily and directly as they do now, without requiring a complex series of choices before the subscriber can gain access to any such station. To that end, local broadcast channels should be part of the initial group of signals offered to subscribers when they turn on their television sets, they should be prominently identified on program guides or menus, and customers should be able to receive these channels through a single interaction.

The non-discrimination provisions of the Telecommunications Act apply not only to subscriber access but also to video programmer access to the OVS system. Section 653(b)(1)(A)

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<sup>25</sup> Id., section 653(b)(1)(D)(iv).

prohibits discrimination with regard to video program carriage. The Commission requests comment on whether it should adopt regulations to promote video programmer access and to prevent OVS operators from unduly restricting access.<sup>26</sup> We believe the Commission should require that, with respect to broadcast signals, the OVS systems must accommodate standard broadcaster inputs. The way to accomplish this is to require OVS operators to design their technology to accept standard analog NTSC input for current broadcaster signals and to accept all ATV inputs which are part of the ATV broadcast transmission standard which the Commission ultimately approves.<sup>27</sup> Unless OVS system compatibility with broadcast signals is mandated, the OVS operator will be in a position to restrict or condition access by imposing an undue economic burden on broadcasters.

The Commission concludes that Congress did not intend the non-discrimination provisions to hinder advertising by an OVS operator of its affiliated programming services.<sup>28</sup> We agree with this interpretation subject to two important caveats. We believe that the OVS operator should not be able to use the navigation device or menu for advertising or promoting its own programs. Unless such a restriction is imposed, there is every reason to expect that the

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<sup>26</sup> Notice, par. 23.

<sup>27</sup> The Grand Alliance system supported by broadcasters and documented by the ATSC has the flexibility to allow for a variety of ATV inputs. ATSC Digital Television Standard, Doc. A/53, Annex B (September 16, 1995).

<sup>28</sup> Notice, par. 49.

OVS operator would use the navigator device or menu for this purpose. This would not only give it a market advantage over other programmers but would undermine the central purpose of the menu -- to give the viewer an immediate and complete list of available program offerings in order to expeditiously make a selection. With respect to billing inserts and other forms of off-system advertising, we would agree that no restriction should be imposed on the OVS operator provided that other program providers are given ready access to the OVS subscriber list for the purpose of directing their own advertising to those customers. This proposal would strike the appropriate balance between allowing the OVS operator to implement its own marketing strategy while giving full effect to the non-discrimination policy of the Telecommunications Act.

The Commission seeks comment on what would constitute "suitable and unique" identification.<sup>29</sup> We believe that this provision should be interpreted to apply not just to the programming signal (which in any event must be passed through without alteration pursuant to section 653(b)(1)(D)(iii)) but also to the navigation guide or menu. The OVS operator should be required to carry on the menu not only the name of the provider's program but also the provider's logo or other branding device used to identify its program or its overall service.

The Commission asks whether section 653(b)(1)(D)(iv) should apply to every navigational device or menu even if a particular

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<sup>29</sup> Notice, par. 51.

subscriber does not subscribe to the unaffiliated programmers that are omitted.<sup>30</sup> In our view, a requirement that every program option be listed on the menu for every subscriber, including programs for unordered services, could have the unfortunate result of cluttering the menu to the point that it would undermine the menu's purpose as a primary and user-friendly means to program selection. At the same time, we believe that the non-discrimination requirement in section 653(b)(1)(D)(i) requires that every menu should inform the viewer that other program services may be ordered. The menu should tell the viewer how he can access a second screen which would disclose more complete information concerning these other services.

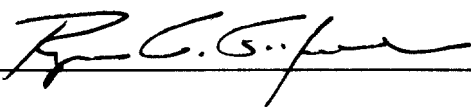
#### Conclusion

The Telecommunications Act mandates that OVS systems are obligated to comply with the 1992 Cable Act must carry and retransmission consent rules, which establish signal carriage preference for broadcast stations, as well as the Commission's program exclusivity rules, which protect broadcasters' property rights. The Commission should give full force and effect to the Telecommunication Act's mandate in its OVS regulations. The Commission should also give broad scope to the non-discrimination provisions of the act to insure that broadcast stations are as universally available and readily accessible in the OVS world as they are over-the-air.

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<sup>30</sup> Notice, par. 50.

Respectfully submitted,

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April 1, 1996